

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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COINBASE, INC.,)
 Petitioner,)
 v.) No. 23-3
DAVID SUSKI, ET AL.,)
 Respondents.)
- - - - -

Pages: 1 through 50
Place: Washington, D.C.
Date: February 28, 2024

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
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1 P R O C E E D I N G S

2 (11:36 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 23-3, Coinbase versus
5 Suski.

6 Ms. Ellsworth.

7 ORAL ARGUMENT OF JESSICA L. ELLSWORTH
8 ON BEHALF OF THE PETITIONER

9 MS. ELLSWORTH: Mr. Chief Justice, and
10 may it please the Court:

11 The Federal Arbitration Act requires
12 courts to enforce arbitration agreements
13 according to their terms. Respondents and
14 Coinbase agreed to arbitrate any disputes about
15 Coinbase services and to delegate to an
16 arbitrator any threshold disputes about whether
17 specific claims were subject to arbitration.

18 Despite this delegation clause, the
19 parties have spent nearly three years disputing
20 this threshold issue. That's because, instead
21 of enforcing the delegation clause, the courts
22 below came up with rationales to evade it and to
23 instead answer the question of arbitrability for
24 themselves.

25 The Ninth Circuit did so by

1 characterizing Respondents' challenge as one of
2 contract formation, asserting that contract
3 formation can never be delegated and
4 sidestepping the delegation clause. The issue,
5 as the court of appeals saw it, was whether the
6 parties formed a contract to arbitrate these
7 claims.

8 If that approach were correct, courts
9 in every case could ignore delegation clauses by
10 just characterizing an arbitrability dispute as
11 a question of whether the parties formed a
12 contract to arbitrate the claims at issue.

13 Respondents do not defend that
14 reasoning. They agree the contracts here were
15 formed and that they were in effect. Their
16 argument is that the scope of the otherwise
17 applicable arbitration agreement was narrowed by
18 a later contract to exclude their asserted
19 claims. That question is one of arbitrability,
20 and the parties agreed an arbitrator would
21 decide it.

22 Respondents blur three distinct legal
23 questions in a case like this one. The first is
24 the merits of the claims the Respondents assert.
25 The second is whether those -- the merits of

1 those claims should be arbitrated. And the
2 third, which is the only question that was
3 before the courts below and is before this
4 Court, is who decides whether the merits should
5 be arbitrated. This third question is
6 antecedent to the other two.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Isn't the problem the
9 confusion that results from the difference
10 between the official rules and the agreement?

11 MS. ELLSWORTH: So, Your Honor, at
12 some level, there is some confusion that the
13 Respondents have argued results from looking at
14 these two together. But the only way there is
15 confusion is if you conflate those different
16 layers of questions because the -- the -- the
17 delegation clause that's in the arbitration
18 agreement answers directly the who decides.

19 JUSTICE THOMAS: So what is the source
20 of the disagreement here? Doesn't it come from
21 the -- the -- the rules?

22 MS. ELLSWORTH: So the source of the
23 agreement is --

24 JUSTICE THOMAS: Disagreement.

25 MS. ELLSWORTH: Certainly. The source

1 of the disagreement is that there is a forum
2 selection clause in the official rules that says
3 something about controversies regarding the
4 promotion.

5 And Respondents have argued that, by
6 using that language, the second contract somehow
7 carved out of the arbitration agreement the
8 claims they want to assert here.

9 JUSTICE THOMAS: Well, couldn't this
10 have been solved in drafting by simply either
11 having an express arbitration provision in the
12 official rules or by referring back to and
13 incorporating the user agreement?

14 MS. ELLSWORTH: So, Your Honor, I
15 think those are certainly questions that could
16 be and should be addressed by the arbitrator
17 when this gets there. But -- but the threshold
18 question is whether the confusion that Your
19 Honor is referencing has anything to do with the
20 who decides issue. And there's nothing in the
21 official rules language --

22 JUSTICE THOMAS: Well, I think it goes
23 a little deeper because you can also say, is
24 there actually an arbitration agreement that
25 comes out of the -- the rules?

1 MS. ELLSWORTH: So, Your Honor, I -- I
2 don't think there is an arbitration agreement
3 anywhere in the official rules. The
4 Respondents' argument is to try to take the
5 official rules to create ambiguity about the --
6 or -- or confusion, as Your Honor said, about
7 what claims are actually subject to arbitration.

8 JUSTICE THOMAS: Yeah.

9 MS. ELLSWORTH: But that is a
10 garden-variety arbitrability question. It
11 doesn't speak to the threshold, gateway who
12 decides question.

13 JUSTICE JACKSON: So can I ask you --
14 oh, go ahead. Go ahead.

15 JUSTICE KAVANAUGH: Go ahead.

16 JUSTICE JACKSON: Can I ask you about
17 the who decides question? Because I -- I'm
18 follow -- I think I'm following your argument,
19 but I -- I guess I'm questioning whether you're
20 right that the only way there is confusion is if
21 you conflate the questions.

22 So let me -- let me posit this
23 hypothetical. Suppose we have two contracts,
24 the first of which has a delegation clause that
25 answers the who decides question, and the answer

1 in the first contract is the arbitrator decides.
2 We have a second contract that answers the
3 delegation question, and the answer in that case
4 is the court decides.

5 In that situation, where you have
6 these two different contracts with two different
7 clear delegation principles, isn't the question
8 at that point, which contract controls? Which,
9 you know, I take it is another way of the Ninth
10 Circuit saying, well, this contract superseded
11 that one. But, really, it's a question at that
12 point of what did the parties intend, what was
13 their agreement about which of these two
14 contracts controls the situation.

15 And in that case, I think you go to
16 the court. Why -- why am I wrong about that?
17 And isn't that the situation that's actually
18 being presented on these facts?

19 MS. ELLSWORTH: So I think you are
20 right about that, not wrong about it. And I
21 think the distinction between your hypothetical
22 and this issue in this case is -- is a very
23 important one.

24 You're right about it because, in your
25 hypothetical, you identified a contract with a

1 delegation clause and a second contract that
2 isn't silent about delegation; it specifically
3 addresses delegation and has a different
4 provision.

5 So a party could come into court
6 resisting arbitration and make a specific
7 challenge to the delegation clause in the first
8 contract that is directed at whether that
9 particular delegation clause has been superseded
10 by the later delegation clause. It's all at
11 this who decides level.

12 The problem in this case is that the
13 -- from the very beginning, the Respondents have
14 agreed this arbitration agreement remains in
15 effect. This delegation clause remains in
16 effect. It would cover these claims.

17 JUSTICE JACKSON: I understand, but by
18 operation of the law, don't we have the --
19 basically the same thing here? Because the
20 second contract is not completely silent. The
21 second contract says forum selection, go to --
22 you know, disputes go to the court.

23 And I thought that by operation of
24 law, when you don't speak to delegation in a
25 situation like that, it's -- the choice is --

1 the delegation is to the court. So that, in
2 effect, even though we don't have those words in
3 the second contract, we basically achieve the
4 same thing. Am I wrong about that?

5 MS. ELLSWORTH: I think you are --

6 JUSTICE JACKSON: Okay.

7 MS. ELLSWORTH: -- just a little bit
8 off about that.

9 JUSTICE JACKSON: Okay.

10 MS. ELLSWORTH: And the nuance here, I
11 think, is the exact nuance that this Court
12 identified really going all the way back to
13 Prima Paint but through Rent-A-Center itself,
14 where it talked about the fact you can have
15 validity challenges that are -- that occur at
16 these different levels.

17 So you can argue that there's some
18 sort of invalidity or some sort of supersession
19 that occurs at the level of the arbitration
20 agreement. You can also have one that occurs at
21 the level of the delegation clause.

22 And under the severability principle
23 that this Court has consistently applied and
24 that it draws directly from the text of Section
25 2 of the FAA, the only question here is whether

1 the -- the Respondents' argument addresses the
2 who decides question.

3 JUSTICE KAVANAUGH: Can I -- keep
4 going.

5 JUSTICE JACKSON: No, I'm -- it's all
6 right. I'm done.

7 MS. ELLSWORTH: So the only -- only
8 other point I would make that I think is
9 important to understand about this is that a
10 delegation clause by its very nature must reach
11 more broadly than an arbitration agreement, and
12 that's because, when you get to the del -- when
13 you -- when you have the delegation and you end
14 up in front of the arbitrator, sometimes the
15 answer will be yes, this should be arbitrated;
16 sometimes it will be no, it shouldn't be, but
17 the force of the delegation clause does not turn
18 on the reach of the arbitration agreement.

19 JUSTICE KAVANAUGH: So, from the reply
20 brief, page 9, I located a point of possible
21 agreement between you and Respondent on a remand
22 possibility. So you say on page 9 in the reply
23 brief, "Because the Ninth Circuit did not decide
24 whether the sweepstakes official rules displaced
25 the delegation clause, this Court could vacate

1 the judgment below and instruct the Ninth
2 Circuit to apply the FAA's severability rules,
3 see response 58," the response to the red brief.

4 The red brief said the Court should
5 remand this case to the Ninth Circuit to more
6 thoroughly consider whether the official rules
7 partially modify the user agreement's delegation
8 clauses they say under non-preempted state laws
9 of contract interpretation.

10 Are you all saying the same thing
11 there? And if you both agree that the Ninth
12 Circuit's analysis is wrong, it should be
13 remanded, are we done?

14 MS. ELLSWORTH: So I think, Your
15 Honor, that we do both agree that the Ninth
16 Circuit's analysis was wrong. I think we do
17 both agree that this should be remanded.

18 I think we have a disagreement when
19 you get beyond that.

20 JUSTICE KAVANAUGH: The -- the under,
21 can we just remand and say that's for the Ninth
22 Circuit to -- to figure out in the first
23 instance?

24 MS. ELLSWORTH: You can. I think it
25 would be important --

1 JUSTICE KAVANAUGH: And if we do that,
2 are we done?

3 (Laughter.)

4 MS. ELLSWORTH: So, Your Honor, I
5 think you -- I think you could stop there.

6 JUSTICE KAVANAUGH: Okay.

7 MS. ELLSWORTH: I think there are some
8 reasons not to stop there and to add a little
9 bit of an explanation.

10 JUSTICE KAVANAUGH: But we could. I
11 just want to get the "could" and the Respondent.

12 (Laughter.)

13 MS. ELLSWORTH: Yes. Yes, Your Honor.
14 Yes. I -- I --

15 JUSTICE KAVANAUGH: And then tell me
16 why we shouldn't, but I just wanted to get the
17 "could." Okay.

18 MS. ELLSWORTH: Well, I -- I think you
19 -- you could stop there, but in saying that
20 you're remanding the case, I think there are
21 three important principles that the Ninth
22 Circuit went astray on that I would recommend
23 that this Court provide as guidance because this
24 is a situation, successive contracts come up not
25 infrequently in all sorts of commercial

1 settings, consumer settings.

2 The first is that the severability
3 principle applies just as much in a successive
4 contract scenario as it does to a single
5 contract scenario. That means that the court
6 can only entertain challenges directly to the
7 validity or enforceability of the delegation
8 clause itself.

9 The second principle that I think
10 would be important to explain is that delegation
11 clauses can and regularly do direct an
12 arbitrator to resolve disputes about whether an
13 arbitration agreement exists and whether it
14 covers a particular dispute.

15 The third point I think that this
16 Court should make in remanding it is that a
17 court cannot refuse to enforce a delegation
18 clause based on the court's view that a later
19 contract changes the scope of what disputes are
20 arbitrable because, as I said in -- in response
21 to your earlier question, the force of a
22 delegation clause does not rise or fall on the
23 scope of --

24 JUSTICE SOTOMAYOR: These are huge
25 changes.

1 CHIEF JUSTICE ROBERTS: Well, you --
2 you do --

3 JUSTICE SOTOMAYOR: I'm sorry. These
4 are huge changes. You are now creating a whole
5 set of federal rules on what constitutes a
6 superseding agreement or not.

7 I don't -- we didn't grant cert on
8 that. We granted cert on a very narrow
9 question, and the narrow question was where
10 parties enter into an agreement -- an
11 arbitration agreement with a delegation clause,
12 should an arbitrator or a court decide whether
13 that agreement is narrowed by a later contract
14 that is silent as to arbitration and delegation.

15 I don't know whether the silence or
16 not is relevant. The question is what does
17 state law do. We didn't answer -- we didn't ask
18 for briefing on that. The short answer is the
19 court decides what state law says or doesn't
20 say.

21 Here, the Ninth Circuit decided that
22 three years into this litigation, two appeals to
23 -- to the Supreme Court that have been accepted.
24 Why shouldn't we just answer that question? The
25 Court decides it. State law may guide the Court

1 in whether there's been a superseding agreement,
2 but we shouldn't be creating federal rules for
3 the state to follow or not follow in
4 interpreting contracts.

5 MS. ELLSWORTH: Justice Sotomayor, we
6 are not asking for you to create any federal
7 rules in resolving this case. The severability
8 rule is something this Court has applied
9 consistently. It has drawn directly from the
10 text of Sections 2, 3, and 4.

11 And all we're asking is that in -- in
12 remanding this, you make clear that the
13 severability rule applies here, just as it
14 always does.

15 JUSTICE SOTOMAYOR: No, they've --

16 CHIEF JUSTICE ROBERTS: Well --

17 JUSTICE SOTOMAYOR: -- answered that
18 -- I'm sorry.

19 CHIEF JUSTICE ROBERTS: I'm -- I -- I
20 would suppose that your answer could be that it
21 -- it depends. I mean, simply because there's a
22 subsequent contract that is silent doesn't mean
23 that the delegation clause covers all of that,
24 right?

25 You could have a big enterprise and

1 you have a delegation clause in a particular
2 arbitration agreement, and there's a contract
3 entered between the same parties somewhere down
4 the line concerning a totally different issue.
5 And do you think in that situation it still goes
6 to the arbitrator --

7 MS. ELLSWORTH: So, Your Honor --

8 CHIEF JUSTICE ROBERTS: -- to decide
9 whether he or she has been delegated the
10 authority to arbitrate that agreement?

11 MS. ELLSWORTH: Mr. Chief Justice, I
12 think there is a practical answer to that and
13 there is a doctrinal answer to that.

14 The practical answer is that a party
15 only invokes a delegation clause when it thinks
16 it has a real claim that the dispute is actually
17 subject to arbitration.

18 So -- so, for example, in this case,
19 the Respondents have agreed that absent the
20 official rules changing it, their claims are
21 subject to -- to arbitration. So that's the --
22 that's the practical answer.

23 CHIEF JUSTICE ROBERTS: Well, put that
24 aside. Well -- or, no, I'll answer it now. I
25 mean, the parties invoke it or not depending

1 upon how they regard their self-interest. I
2 mean, they may well have a favorable view of the
3 person who is arbitrating or not. They may well
4 have a particular reason to proceed more
5 promptly than litigation would.

6 What is the internal limit that you
7 have that says no, that contract is not
8 sufficiently connected to why we have a
9 delegation clause under the other one?

10 MS. ELLSWORTH: Your Honor, when a
11 party invokes a delegation clause, this Court
12 unanimously in the Henry -- Henry Schein
13 decision from a few terms ago made clear that
14 courts have no power and no business answering
15 the arbitrability question for themselves, even
16 in a case where they think the invocation of the
17 delegation clause was wholly groundless.

18 We are a far cry from that scenario
19 here. I think Your Honor's hypothetical where
20 there are two contracts that really address
21 totally disconnected scenarios might be closer
22 to Henry Schein, but Henry Schein then, I think,
23 provides the appropriate avenue.

24 And as the Court said in that case, if
25 someone really is frivolously or improperly

1 invoking a delegation clause, arbitrators have
2 ways to quickly move the matter back to court.
3 There may be sanctions available. There are
4 other tools --

5 CHIEF JUSTICE ROBERTS: Yeah, but at
6 some point, you get into the fundamental
7 principle of arbitration that the parties must
8 have agreed to turn something over to the
9 arbitrator. And it seems to me that if you get
10 a contract that is way out of the -- however you
11 want to describe it -- the scope, that saying
12 it's up for the arbitrator kind of skips over
13 that pretty important part.

14 MS. ELLSWORTH: Your Honor, in this
15 case, there is undisputedly a clear and
16 unmistakable delegation clause of all disputes
17 about Coinbase services.

18 These claims are about Coinbase
19 services. The Respondents say that they used
20 Coinbase services to enter into a sweepstakes
21 when they wished they had mailed in a postcard
22 instead. That is absolutely a dispute about
23 Coinbase services. It is covered by the
24 arbitration agreement as written.

25 The question becomes does the -- do

1 the official rules somehow carve out that
2 particular set of claims from arbitration, but
3 there's not a carveout from delegation. And
4 that makes sense, because the purpose of
5 delegation is to set up a streamlined, efficient
6 process for resolving these arbitrability
7 disputes.

8 It is about consent to have an
9 arbitrator quickly and efficiently tell the
10 parties, does this dispute belong in court or
11 does this dispute belong in arbitration?

12 JUSTICE JACKSON: But on the --

13 JUSTICE ALITO: On the pure -- on the
14 pure who question, which is what we agreed to
15 review, you say on page 12 of your reply brief,
16 "Coinbase agrees that the Court can and should
17 assess whether the official rules displace the
18 parties consent to have an arbitrator decide
19 arbitrability." I mean, that seems to answer
20 and concede the who question.

21 And then there is the what question.
22 But we didn't grant review on the what question.

23 MS. ELLSWORTH: Right. You -- that's
24 absolutely right, Justice Alito. You granted
25 review on the -- on the who -- who decides

1 question.

2 JUSTICE ALITO: Right.

3 MS. ELLSWORTH: And the answer to the
4 who decides question in a case like this where
5 there is a delegation clause that remains in
6 effect is absolutely that the arbitrator does.
7 That --

8 JUSTICE ALITO: Well, haven't you --
9 you've -- you've begged the question when you
10 say that remains in effect. The question is
11 whether it remains in effect after the official
12 rules.

13 MS. ELLSWORTH: Your Honor, that's
14 correct. And that is a --

15 JUSTICE ALITO: And who decides that?

16 MS. ELLSWORTH: So, if the parties
17 came to court and made an argument that was
18 specifically directed at the delegation clause
19 somehow being undermined, this would require
20 showing that your argument addresses the same
21 level of concern as who decides.

22 Again, if we think about you've got
23 who decides, you've got arbitrability, and you
24 have the merits.

25 They pointed to a provision that talks

1 about a court deciding controversies regarding
2 the promotion. This threshold question is not a
3 controversy regarding the promotion.

4 And I think that's why, in the
5 district court, in the court of appeals, in this
6 Court, the way Respondents see to get to a
7 delegation invalidation is to argue that the
8 arbitration agreement has been narrowed and
9 there's been some corresponding narrowing of the
10 delegation clause.

11 JUSTICE JACKSON: Can we set aside the
12 way they framed it? Because I agree it's a
13 little confusing if you start from the world of
14 we have a delegation agreement, then we have a
15 subsequent agreement, and the question is to
16 what extent the subsequent agreement is a
17 carveout or narrows or whatever?

18 Let's say we don't frame it that way.
19 Let's say we frame it in the way that I want to
20 -- want to think about it, which is we have
21 contract A that absolutely answers the who
22 decides question, and then we have contract B
23 that implicitly decides the who -- who decides
24 question, because I understood by operation of
25 law, based on basic -- you know, what the Chief

1 Justice was saying, is that if you don't pick
2 arbitration, if you're silent about it, then the
3 background rule operating is that arbitration is
4 not what happens and any question about whether
5 or not arbitration is what happens, the who
6 decides, goes to the court. So we have contract
7 number 1 that is picking arbitrator is the one
8 who decides, and we have contract number 2 that
9 is implicitly picking court is the one that
10 decides.

11 I thought you agreed with me at the
12 beginning that in that situation, it's a
13 question for the court. And that's what we're
14 -- which of these contracts is actually operable
15 today?

16 MS. ELLSWORTH: Justice Jackson, I
17 think the difference between your earlier
18 hypothetical, as I --

19 JUSTICE JACKSON: Yes.

20 MS. ELLSWORTH: -- understood it, and
21 this one is that the second contract, in your
22 earlier hypothetical, specifically said that the
23 delegation clause -- it -- it identified that
24 there wouldn't be a delegation; it would be on
25 some sort of different terms.

1 In this case, the second contract says
2 nothing --

3 JUSTICE JACKSON: Right, but --

4 MS. ELLSWORTH: -- about delegation.

5 JUSTICE JACKSON: -- do you disagree
6 with me that, by operation of law, when a
7 contract says nothing, we're -- it -- the court
8 is the one that decides what it means and what
9 happens?

10 MS. ELLSWORTH: In the abstract. If
11 the only --

12 JUSTICE JACKSON: No, not in the
13 abstract. In the -- in the way we look at the
14 law. If it doesn't say anything about
15 arbitration --

16 MS. ELLSWORTH: So if it -- if the
17 contract didn't say anything about
18 arbitration --

19 JUSTICE JACKSON: Yeah.

20 MS. ELLSWORTH: -- we wouldn't be able
21 to invoke it as part of a motion to compel
22 arbitration.

23 JUSTICE JACKSON: No. What you're
24 doing is you're invoking contract 1. So --

25 MS. ELLSWORTH: That's right.

1 JUSTICE JACKSON: -- what I'm saying
2 he's invoking contract 2. We have two people
3 running in with contracts, one of which suggests
4 that this is supposed to be decided by the
5 court. The other suggests that this is supposed
6 to be decided by the arbitrator.

7 And so in that situation, isn't the
8 question which contract controls in this
9 situation?

10 MS. ELLSWORTH: So, Justice Jackson, I
11 -- I think it's important to figure out what the
12 correct starting point is. And I think one of
13 the remaining places of daylight between the
14 Respondents and the Petitioner here is what the
15 right starting point is.

16 We say the right starting point is the
17 arbitration agreement that we seek to enforce.

18 JUSTICE JACKSON: Yeah.

19 MS. ELLSWORTH: And here that is the
20 delegation clause in the first contract. That
21 delegation clause, under the -- the
22 straightforward operation of Section 2 of the
23 FAA, remains valid, enforceable, and irrevocable
24 unless they can make some state law challenge
25 that would displace it.

1 And so the question becomes -- and
2 this is the analysis the Ninth Circuit didn't do
3 -- have they -- by pointing to the forum
4 selection clause that talks about resolving
5 controversies about the promotion, have they
6 done anything under state law to displace the
7 who decides delegation clause in the first
8 contract?

9 JUSTICE GORSUCH: Counsel, can I ask
10 you just a practical question? I fully
11 appreciate your argument that parties might send
12 to the arbitrator the question of who decides
13 and, at the same time, have the -- the merits
14 decided in one place or the other, even within a
15 single arbitration agreement. The arbitrator
16 decides whether agreements go to court or
17 arbitration. Some will; some won't. I get
18 that.

19 I guess I'm a little curious why your
20 -- your client is fighting this so hard if at
21 the end of the day you're going to wind up
22 saying, yeah, sweepstakes dispute go to court.
23 So if the arbitrator is going to have to send it
24 to court anyway, why -- why are we here?

25 MS. ELLSWORTH: So, Your Honor, that's

1 the practical point that I tried to make in
2 response to the Chief Justice. I think if we
3 thought this was going to end up back in court,
4 we wouldn't have invoked --

5 JUSTICE GORSUCH: No, I --

6 MS. ELLSWORTH: -- the delegation
7 clause.

8 JUSTICE GORSUCH: -- I fully
9 appreciate that, and I also appreciate that
10 under Schein that arbitrator has -- could
11 sanction you for frivolous effort to keep this
12 in arbitration. My question is just more
13 practical than that, even, and more
14 nitty-gritty.

15 Why in this case are you fighting it
16 when you have this second agreement that would
17 seem to route -- I accept maybe the arbitrator
18 should have decided this. I'm spotting you
19 that.

20 MS. ELLSWORTH: So, Your Honor --

21 JUSTICE GORSUCH: But why?

22 MS. ELLSWORTH: -- the answer is
23 because when we get to the arbitrator, we think
24 we have very good reasons --

25 JUSTICE GORSUCH: I know that. What

1 are they?

2 MS. ELLSWORTH: I'm -- I'm happy to
3 talk you through a number of them. One is that
4 this provision is in the contract. It applies
5 to mail-in applicants, who participate in a
6 sweepstakes that way.

7 The second is that the contract -- the
8 -- the official rules speak about jurisdiction,
9 and a motion to compel arbitration and an
10 arbitration agreement are not about removing the
11 jurisdiction of the court.

12 It speaks to -- to personal
13 jurisdiction. Really, that's what paragraph 10
14 is about. And we don't think it operates as a
15 carveout on the arbitration agreement's scope in
16 the way that the Respondents have argued.

17 So -- so those are exactly the points
18 that we would make to an arbitrator. And I
19 think Henry Schein makes clear an arbitrator may
20 agree, it may disagree with us, but the
21 arbitrator gets to make that decision in the
22 first instance.

23 JUSTICE BARRETT: Counsel, can I --
24 are you done?

25 JUSTICE GORSUCH: Yeah.

1 JUSTICE BARRETT: Can I just return to
2 Justice Kavanaugh's point about what the common
3 ground is here? So you agree that the question
4 of whether there is a valid delegation clause is
5 one for the court?

6 MS. ELLSWORTH: The question of
7 whether there is a -- under the severability
8 principle, yes.

9 JUSTICE BARRETT: You agree that
10 courts make that decision by clear and
11 convincing evidence?

12 MS. ELLSWORTH: I think courts make
13 that -- they -- they make that decision, yes.

14 JUSTICE BARRETT: Okay. And you agree
15 that there is a dispute here about whether there
16 is a delegation of the arbitrability question to
17 the arbitrator?

18 MS. ELLSWORTH: I'm sorry. We agree
19 or disagree?

20 JUSTICE BARRETT: I'm saying -- I'm
21 asking, do you agree with me that the dispute
22 between you right now is about whether there is
23 a delegation that will send, taking these two
24 contracts together, send the dispute to
25 arbitration on the arbitrability question?

1 MS. ELLSWORTH: So I think we agree
2 that there is a -- I think both sides agree that
3 there is a delegation clause and that, as
4 originally formulated, it would cover this
5 dispute. The Respondents say --

6 JUSTICE BARRETT: Right, but -- but
7 we're looking at two -- we're looking at two
8 contracts. So you -- you agree -- let's finish
9 this up very quickly. You agree that there's a
10 dispute about whether there's a valid delegation
11 clause that applies here to send it to the
12 arbitrator?

13 MS. ELLSWORTH: We -- our position is
14 that there is a valid delegation clause and it
15 should be enforced.

16 JUSTICE BARRETT: But the -- no. I'm
17 sorry. Maybe I was unclear. But the question
18 is, do you agree that there -- the question here
19 is about the existence, the validity of a
20 delegation clause?

21 MS. ELLSWORTH: Absolutely, Your
22 Honor. The -- the validity of the delegation
23 clause, I think, is reserved for a court to
24 resolve, applying the severability principle,
25 which limits the arguments that can be --

1 JUSTICE BARRETT: Okay.

2 MS. ELLSWORTH: -- offered to

3 undermine it.

4 JUSTICE BARRETT: But you agree on

5 those three questions, though?

6 MS. ELLSWORTH: Yes.

7 CHIEF JUSTICE ROBERTS: Thank you,

8 counsel.

9 Justice Thomas?

10 Justice Alito?

11 Justice Sotomayor?

12 Justice Kagan?

13 Justice Gorsuch?

14 Justice Kavanaugh?

15 JUSTICE KAVANAUGH: Any change from

16 when I said "could remand"? No?

17 (Laughter.)

18 MS. ELLSWORTH: No change, Your Honor.

19 JUSTICE KAVANAUGH: Okay.

20 CHIEF JUSTICE ROBERTS: Justice

21 Barrett?

22 Justice Jackson?

23 Okay. Thank you, counsel.

24 Mr. Harris?

25

1 ORAL ARGUMENT OF DAVID J. HARRIS, JR.

2 ON BEHALF OF THE RESPONDENTS

3 MR. HARRIS: Mr. Chief Justice, and
4 may it please the Court:

5 I'm going to abandon what I planned to
6 talk about and try to answer Justice Gorsuch's
7 question. Why are they fighting this so hard?
8 And that only occurred to me within the last
9 week or so.

10 And the answer is there's a strategic
11 reason. They want the Court -- they don't care
12 who decides arbitrability. All they care about
13 is how arbitrability gets decided because that's
14 what goes to liability at the end of the day.
15 And so the plan is we need the Supreme Court to
16 overrule the Ninth Circuit's weird "existence"
17 language.

18 Why do they need that and that only?
19 The reason is that "existence" language
20 originated from the Goldman Sachs case that was
21 cited in our Ninth Circuit opinion. The Goldman
22 Sachs case was somewhat similar to this case in
23 that there was a preexisting agreement to
24 arbitrate, but then a subsequent, more specific
25 agreement to litigate.

1 The Ninth Circuit was looking at that
2 situation and thinking: Shoot, we're bound to
3 apply the old presumption in favor of
4 arbitrability under federal law, but we know
5 that as a matter of contract law, there was no
6 real, mutual intent to arbitrate this dispute
7 under the most recent, most specific agreement.

8 So they made up a new federal rule.
9 Oh, this is a formation dispute. This is an
10 existence dispute. So that they could avoid the
11 presumption of in -- in favor of arbitrability
12 and do the right thing under state law.

13 We've gone to great pains to argue
14 that non-preempted state laws are what apply
15 here because at the end of the day, those are
16 the only laws that are capable of accurately
17 discerning the parties' true intentions, no
18 matter what type of contractual mess gets thrown
19 in front of judges.

20 It's impossible to make one federal
21 rule, two federal rules, three federal rules
22 that are going to accurately discern the
23 parties' contractual intentions in -- in an
24 infinite number of business situations.
25 Traditional state law can do that. And we ask

1 that the Court apply that here and welcome to
2 answer any questions.

3 JUSTICE THOMAS: But why wouldn't a --
4 a later agreement that modifies the earlier
5 contract simply go to what the scope of the
6 agreement is?

7 MR. HARRIS: So it goes to two scopes.
8 It goes to the scope of the agreement to
9 arbitrate the merits of the dispute, and our
10 position that we've tried to brief very heavily
11 is that it goes to the scope of the agreement to
12 delegate this arbitrability dispute to the
13 arbitrator.

14 And our reason for doing that is that
15 under Granite Rock, consent to arbitrate is
16 dispute-specific. If that's true in the context
17 of an arbitration agreement, it also has to be
18 true in the context of a delegation agreement.

19 JUSTICE GORSUCH: But, counsel, the
20 arbitration agreement, you concede, is still
21 operative, right?

22 MR. HARRIS: For -- for disputes
23 unrelated to the sweepstakes, absolutely.

24 JUSTICE GORSUCH: Yeah. Well --
25 well -- and it says it applies to everything,

1 all disputes about Coinbase services, right?

2 The answer has to be yes.

3 MR. HARRIS: Yeah. On -- on -- on its
4 -- its isolated terms, that's what the --

5 JUSTICE GORSUCH: That's what it says,
6 that's what it says, isolated terms, okay.

7 And I guess my question for you is the
8 inverse of the one I asked your friend on the
9 other side. The point in Schein was, if you
10 agree to say the arbitrator gets to direct
11 things, if this were all in one contract, it's
12 possible some things would be arbitrated, agreed
13 to arbitrate and some things would be -- you
14 agree to send to court. And if it were in one
15 contract, there's no doubt that the arbitrator
16 would decide which -- which direction to route
17 things, right?

18 The only question is does the second
19 contract make this different than it being in a
20 single contract. And I struggle to see why that
21 would be the case. And I furthermore struggle
22 to see why you would care because your real
23 argument is that the agreement is to litigate
24 this in court. And the routing, who's going to
25 do the routing? Now we're at the Supreme Court

1 of the United States, years have passed, we
2 still don't know where this case is going to be.

3 You could have had an answer from an
4 arbitrator that you belong in court years ago.
5 Why didn't you? Again, I just struggle to see
6 both sides why we're here.

7 MR. HARRIS: So, to deal with the
8 first part with the Ninth Circuit and the user
9 agreement, I just want to make clear that the
10 Ninth Circuit didn't just rely on this existence
11 language. After it sort of regurgitated that --

12 JUSTICE GORSUCH: I'm not asking about
13 the Ninth Circuit because it --

14 MR. HARRIS: Well -- well -- well --

15 JUSTICE GORSUCH: -- seems to me both
16 sides have disavowed the Ninth Circuit's
17 opinion.

18 MR. HARRIS: -- it -- it really --

19 JUSTICE GORSUCH: I'm asking why you
20 are here because you could have had an answer
21 from an arbitrator --

22 MR. HARRIS: Sure.

23 JUSTICE GORSUCH: -- because I think
24 your -- your argument's really quite strong as
25 to where this gets routed.

1 MR. HARRIS: Well, we've -- we've
2 already won in court. We've already won
3 arbitrability in court. And they haven't
4 challenged that here. So the only way they
5 resurrect the arbitrability dispute at all is by
6 winning the delegation agreement.

7 JUSTICE GORSUCH: My question is,
8 though, if -- if you -- if you think you can win
9 on -- on where this goes, why didn't you just go
10 to the arbitrator to get a quick answer? Why --
11 why -- why litigate it all the way to the
12 Supreme Court of the United States?

13 I'll try it one more time.

14 MR. HARRIS: So, so, I mean, I guess
15 I'd have to go back and think about why I did it
16 in the trial court, why I did it in the --

17 JUSTICE GORSUCH: Yeah.

18 MR. HARRIS: -- in the Ninth Circuit.
19 But, here, so arbitrability, not delegation,
20 arbitrability is finally resolved by the federal
21 courts because -- unless this Court sends that
22 dispute back to an arbitrator.

23 JUSTICE GORSUCH: Right. Right.

24 MR. HARRIS: Or the Ninth Circuit
25 sends it back.

1 JUSTICE GORSUCH: That's why -- that's
2 why we're here. We're at the -- at the
3 antecedent question.

4 MR. HARRIS: Well, I don't want them
5 to have a second chance to win arbitrability.
6 They've already lost that.

7 JUSTICE JACKSON: Can I ask you about
8 Justice Gorsuch's hypothetical about things
9 being in one contract? Because I think it
10 actually matters with respect to what's going on
11 here.

12 So, if we had one contract that just
13 had one delegation provision and then later
14 underneath it, it had user agreements,
15 sweepstakes, or whatever, it didn't say
16 anything, you would agree that that delegation
17 clause would apply to the whole thing?

18 MR. HARRIS: I -- I think that's the
19 best reading of the user agreements in
20 isolation.

21 JUSTICE JACKSON: All right. So --
22 but -- but -- but you're saying that, I guess,
23 if we had one contract that had different parts
24 and there was a delegation agreement that was in
25 one part of it and then the other -- that went

1 to the arbitrator and then, in the other, it was
2 pretty clear the parties were saying this is
3 delegated to the court, you're saying that would
4 be a contract formation, the court would have to
5 decide which one of those parts -- which one of
6 those delegation intents was operable?

7 MR. HARRIS: It would definitely be a
8 different question if it -- if the two types of
9 terms were contained in a single agreement
10 between the same two parties.

11 JUSTICE JACKSON: Yes.

12 MR. HARRIS: Here, we have two
13 separate agreements, two separate economic
14 transactions, two separate groups of contracting
15 parties, and that changes the intent analysis
16 under -- under traditional rules of
17 interpretation.

18 JUSTICE KAVANAUGH: The -- are you
19 done?

20 The brief, you agree with Coinbase
21 that the Ninth Circuit's opinion did not
22 accurately reflect the parties' contractual
23 disputes here, right, particularly the
24 references to formation and existence?

25 MR. HARRIS: Only that part, Your

1 Honor, yes.

2 JUSTICE KAVANAUGH: Right. And then
3 you say the Court can correct the Ninth
4 Circuit's reasonings. The Court should
5 remand -- alternatively the Court should remand
6 this case to the Ninth Circuit.

7 Are you -- I'm asking the same
8 question I asked the other -- other side. Can
9 we correct the Ninth Circuit's reasoning as both
10 sides agree it's wrong and then send it back --

11 MR. HARRIS: So -- so I only --

12 JUSTICE KAVANAUGH: -- for a
13 determination of whether the sweepstakes
14 displace the other contract, which could involve
15 a debate about which law controls and all sorts
16 of other things?

17 MR. HARRIS: So I only agree that the
18 existence and formation part of the Ninth
19 Circuit's analysis was wrong. I do not view
20 that part of what they said as what controlled
21 their analysis.

22 So, if you look carefully at their
23 opinion, they have two headings, delegation
24 clause and arbitration or whatever the second
25 heading was. But they have a heading for

1 delegation clause.

2 Under that, Coinbase had argued that,
3 well, this is a dispute about the scope of the
4 arbitration agreement, and, therefore, that's
5 the end of the analysis. It must go to the
6 arbitrator.

7 The Ninth Circuit said: Wait a
8 minute, we're going to actually ask whether that
9 scope language was intended to apply to a future
10 contract like this one that says court only,
11 that has a different set of parties.

12 So -- so all that to say, they did
13 directly address the delegation question before
14 reaching arbitrability. And that's correct
15 under Henry Schein.

16 And they also, in addressing
17 delegation, the question they answered is, is
18 this delegation clause intended to be applicable
19 to this arbitrability dispute?

20 And that's -- that's one correct
21 question to ask under Granite Rock because
22 arbitration is always dispute-specific. It's --
23 we can't just label this an arbitrability
24 dispute and move on.

25 We can't do that because it's also a

1 forum dispute. It's also in substance a dispute
2 about the official rules. We don't actually
3 agree about the scope of the user agreements.
4 We disagree about the scope of the official
5 rules of the June 2021 sweepstakes. How is that
6 not a controversy regarding the sweepstakes as
7 to arbitrability? It's about the arbitrability
8 of the sweepstakes.

9 JUSTICE KAGAN: Do you think --

10 MR. HARRIS: And that was intended for
11 the courts.

12 JUSTICE KAGAN: -- do you think that
13 the Ninth Circuit decided whether the official
14 rules supplant the original arbitration
15 agreement's delegation clause?

16 MR. HARRIS: No. And that -- that's
17 where I think they went wrong if anywhere.

18 JUSTICE KAGAN: So that -- so -- so
19 you think that this is not like, oh, they just
20 forgot to put in a sentence. You think that
21 they never addressed that question?

22 MR. HARRIS: Correct. They stopped at
23 the question before it, which is, look, we don't
24 even have to reach the official rules because
25 we're just looking at the clause, the delegation

1 clause, and we're looking at the arbitrability
2 dispute and we're saying we don't think this was
3 meant to cover this.

4 And -- and that's an applicability
5 decision that is delegation-specific. That's
6 not preempted by the FAA. They haven't -- they
7 haven't addressed it at all.

8 They haven't addressed it under state
9 law. They haven't addressed it under federal
10 law. There's actually -- they just want to
11 focus on this existence language so that they
12 can go back and down and say, hey, this
13 existence rule no longer exists, and, by the
14 way, that was your excuse to apply state law.
15 Now you have to apply the presumption in favor
16 of arbitrability.

17 JUSTICE SOTOMAYOR: I think you just
18 gave away your case. I think you just gave away
19 your case.

20 MR. HARRIS: Well, no, Your Honor.

21 JUSTICE SOTOMAYOR: Your -- your --
22 they came in saying vacate and remand because
23 they didn't address delegation and whether the
24 -- the user agreement -- the sweepstakes
25 agreement superseded that. And you're saying

1 the Ninth Circuit didn't do that.

2 MR. HARRIS: Right. And -- and in my
3 view, they didn't necessarily have to because
4 they asked whether the delegation clause was
5 applicable to this arbitrability dispute about
6 the sweepstakes. They -- they looked at the
7 delegation clause and they said: This wasn't
8 intended to cover this particular arbitrability
9 dispute. And so they said it's not delegated.

10 But, to -- to some of the Justices'
11 point, if we look at just the language of the
12 delegation clause, it's broad enough to cover
13 any arbitrability dispute. So the safer, better
14 way to address this delegation question is were
15 the official rules intended -- or -- or did the
16 official rules have the effect of modifying the
17 delegation clause as to these types of
18 arbitrability disputes?

19 JUSTICE GORSUCH: I -- I -- I -- I
20 just -- I'm struggling. I -- I certainly see
21 the argument that the second agreement modifies
22 where this thing should go and should be
23 resolved and by whom ultimately. But I think
24 you've just conceded over and over again that
25 the first agreement says those questions go to

1 the arbitrator and it's broad in scope and it
2 covers everything, all relationships with
3 Coinbase. So you want us to vacate and remand
4 for more proceedings in the Ninth Circuit on
5 whether that first agreement modifies the
6 second, rather than just going to get an answer
7 from the arbitrator.

8 MR. HARRIS: I mean, remand is not our
9 -- our first request. Our first request is to
10 affirm the judgment and -- and just make clear
11 that that "existence" language isn't the way to
12 go about it. The way to go about it is ask
13 whether the parties intended the delegation
14 clause to apply to this arbitrability dispute.

15 And as -- I mean, I could give you a
16 long economic, strategic answer --

17 JUSTICE GORSUCH: Well, I'm kind of --

18 MR. HARRIS: -- for why we're --

19 JUSTICE GORSUCH: -- kind of curious,
20 I admit. I mean, this is about a sweepstakes,
21 you know, entry. And how much money is at
22 stake? And why are we litigating all the way to
23 the Supreme Court of the United States up and
24 down and up and down over where this goes when,
25 frankly, I would have thought you had a really

1 good shot of getting an arbitrator to say this
2 belongs in court.

3 MR. HARRIS: I would agree, but -- but
4 that wasn't, that wasn't the -- we don't want to
5 take this to an arbitrator. And they don't --
6 they don't care where it goes. We care where it
7 goes. But they don't care where the -- they
8 don't care who decides arbitrability. They just
9 care where the case ends up.

10 We've already won the issue in court
11 of where the case ends up, so we don't want it
12 to go to an arbitrator now to review the Ninth
13 Circuit's arbitrability decision.

14 I'm just answering the question of why
15 we're here.

16 (Laughter.)

17 JUSTICE KAGAN: I mean, because you
18 think an arbitrator will be less likely to send
19 it to court. Is that the reason why you're
20 here?

21 MR. HARRIS: Well, we -- what we have
22 right now is 100 percent certainty. And if an
23 arbitrator is reviewing it, it's less than
24 100 percent certainty.

25 JUSTICE BARRETT: How much money are

1 you seeking in your complaint for this
2 sweepstakes entry thing?

3 MR. HARRIS: So it -- I mean, at the
4 time we filed, we didn't know. At the time we
5 filed, all we knew is that entrants were
6 manipulated into being -- into paying \$100 per
7 person or more to -- to enter the sweepstakes.

8 We are left to estimate, you know, how
9 -- how many people were affected by that.

10 JUSTICE KAVANAUGH: It's a class
11 action, putative, right?

12 MR. HARRIS: Putative.

13 JUSTICE KAVANAUGH: Yeah. That's --
14 that's the answer, isn't it?

15 MR. HARRIS: Yes, Your Honor. That's
16 essentially the answer.

17 CHIEF JUSTICE ROBERTS: Thank you.
18 Counsel, if you have --

19 Justice Thomas?

20 Anybody on that end? Anything
21 further?

22 Thank you, counsel.

23 MR. HARRIS: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Ms. Ellsworth?

25

1 REBUTTAL ARGUMENT OF JESSICA L. ELLSWORTH
2 ON BEHALF OF THE PETITIONER

3 MS. ELLSWORTH: I think as Justice
4 Sotomayor's question made clear, this case needs
5 to be remanded. The Respondents and the
6 Petitioners are in agreement on that. We're
7 here because the Ninth Circuit failed to apply
8 the FAA's federal severability framework and, as
9 a result, failed to do the state law analysis as
10 applied to the delegation clause that it was
11 required to do. The Ninth Circuit never asked
12 whether the later contract specifically overrode
13 the delegation clause under ordinary state law
14 principles.

15 And, Justice Jackson, I think some of
16 your questions were getting at how a delegation
17 clause could actually be overridden in a later
18 contract. And I just want to respond to that
19 briefly because I think it could be expressed as
20 it was in one of your hypotheticals. It
21 could -- a later contract could wipe out
22 arbitration entirely from the parties' business
23 relationship, and then someone could come into
24 court and say that that has, under state law
25 principles, also wiped out the delegation

1 clause. There could be a merger agreement -- a
2 merger clause. There are a number of ways in
3 which it could happen. The fact is that none of
4 them happened here.

5 Everyone agrees the Ninth Circuit
6 didn't decide if the second contract displaced
7 the delegation clause and, instead, just made a
8 ruling on arbitrability. As I think my friend's
9 argument shows, and it's important for this
10 Court on remand to make clear, lower courts
11 cannot collapse the who decides question and the
12 Section 2 analysis for a delegation clause with
13 the later arbitrability question.

14 Justice Gorsuch, in response to your
15 question about what an arbitrator would say
16 here, one other thing to note is that the only
17 Ninth Circuit case on point specifically finds
18 that a forum selection clause does not displace
19 a delegation clause. That's the Mohamed case.
20 It's one of the many reasons that we think these
21 operate on different levels.

22 Just like in the Prima Paint case,
23 where fraud in the inducement could operate
24 differently at the level of the contract and at
25 the level of the arbitration agreement; in

1 Rent-A-Center where unconscionability could
2 apply differently at the contract level, the
3 arbitration agreement level, and the delegation
4 clause level; so too here the forum selection
5 clause could apply differently, and it's
6 important that the Court address it at the
7 specific who decides layer.

8 For all of these reasons, we think the
9 Court should reverse and remand. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 The case is submitted.

13 (Whereupon, at 12:19 p.m., the case
14 was submitted.)
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Official - Subject to Final Review

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